Local Union No. 553, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Plumbing, Heating, Piping and Air Conditioning Contractors Association of Alton, Wood River and Vicinity) *and* Dan Michael *and* Carl Schlemmer *and* Billy H. Belt

Local Union No. 553, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO *and* Rickey A. Minor *and* Pipeco Fabricating Company, Party to the Contract. Cases 14–CB–5290, 14–CB–5290–3, 14–CB–5316, and 14–CB–5333

31 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 May 1982 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent and Party to the Contract Pipeco Fabricating Company (Pipeco) filed exceptions and supporting briefs, and the General Counsel filed exceptions concerning the judge's notice to employees.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified.

We agree with the judge's findings that the Respondent violated Section 8(b)(1)(A) of the Act by threatening to refuse to refer for employment Carl Schlemmer and Dan Michael, and refusing to refer for employment Schlemmer, Michael, and Billy H. Belt because of their intraunion political activities.[2] However, contrary to the judge, we do not find that the Respondent violated Section 8(b)(1)(A) of the Act by its acceptance of recognition from Pipeco and by its execution of a collective-bargaining agreement with Pipeco at such time as it retained a substantial stock interest in Pipeco; that the Respondent violated Section 8(b)(2) of the Act by its execution of a collective-bargaining agreement with Pipeco which contained a union-security clause and required payment of dues and other payments to the Union for pension and benefit funds; or that the Respondent violated Section 8(b)(2) of the Act by its execution with Pipeco of a collective-bargaining agreement which contained a referral clause.[3]

The relevant facts are not in dispute. Ivan "Skipp" Cochran (who later become president of Pipeco) attempted to arrange financing through a bank for the formation of a pipe fabricating company within the jurisdiction of the Union. When the bank withdrew its financing, Cochran sought financial aid from the Union. At that time there were no pipe fabricating shops in the area. The Union's business manager, Joseph C. (Bill) McGhee, testified that he saw the establishment of the fabrication business as an opportunity for employment of union members and, in order to assist Pipeco in its formation, the Union purchased 1500 shares of a total initial issuance of 6000 shares.

The terms of the agreement of sale were such that the Union would hold its stock only 3 years, after which Pipeco had first rights to purchase it if financially able to do so. In addition, proxy, voting, and any other rights possessed by the Union as a result of its stock ownership were assigned to Pipeco's corporate attorney so that the Union would not be involved in the operation or management of the company. The proxy was unconditional except for an obligation to notify the Union concerning any action taken. The Union has never (a) exercised or attempted to exercise any managerial rights; (b) influenced or attempted to influence any managerial decision; or (c) requested to be consulted on any managerial decision. Also, no officer or representative of the Union holds or has held office in Pipeco or its board of directors, nor has the Union requested any such position.

Pipeco commenced operations in October 1980. On 1 November 1980 Pipeco and the Union executed a collective-bargaining agreement. That agreement was an addendum to the "National Fabrication Agreement," identified at the hearing as the "National Minimum Standards Agreement for a

[1] Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the section of his decision entitled "Analysis of the Alleged Threats and Refusals to Refer," 1, pars. 1 and 2, and in 2, par. 7, the judge inadvertently found Kline and McGhee to be agents of the Respondent within the meaning of Sec. 2(11) of the Act, rather than Sec. 2(13). We hereby correct this error.

[2] In issuing an order in lieu of that recommended by the judge, we will not include provisions in the Order which refer to the operation of the hiring hall in general, inasmuch as the consolidated complaint attacks only the Respondent's refusal to refer three employees.

[3] No exception has been taken to the judge's finding that at the time of the execution of the collective-bargaining agreement between the Union and Pipeco there was in existence a representative complement of employees, and that the Respondent did not violate Sec. 8(b)(2) of the Act by accepting recognition from Pipeco as the employees' collective-bargaining representative on that basis.

Commercial Pipe Fabrication Shop-Pipe Fabrication Institute Shop Agreement." On 14 April 1981 the parties executed the "National Fabrication Agreement" which contained a recognition clause, union-security clause, and referral clause. There were 9 employees as of the date of execution of the initial agreement and no more than 25 employees as of the date of the hearing.

The judge found that, by virtue of ownership of 25 percent of Pipeco's outstanding shares, the Union retained a substantial ownership interest in Pipeco, closely tying the Union to management. The judge concluded that, given the Union's 25-percent ownership of Pipeco, its acceptance of recognition from Pipeco and its execution of a collective-bargaining agreement with Pipeco (notwithstanding that the contract provided for prevailing wage rates and fringe benefits) precluded it from fairly representing Pipeco employees and violated Section 8(b)(1)(A) of the Act.

On the same basis, the judge also found that the Respondent violated Section 8(b)(2) of the Act by its execution of a union-security agreement, its entrance into an agreement with Pipeco requiring the payment of dues and other payments to the Union for pension and benefit funds, and its execution of a collective-bargaining agreement containing a referral clause.

"The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interest of all whom it represents." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). As the Board stated in *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954), and in subsequent cases:[4] "[A] union must approach the bargaining table . . . 'with the single-minded purpose of protecting and advancing the interests' of the employees who have selected it as their bargaining agent and there must be no ulterior purpose." The Board inquiry extends into two interrelated areas: (1) the power of the union to control the conduct of the employer (Pipeco), and (2) the temptation, likelihood, or incentive for exercising that power in order to protect the union's interest in the company (25-percent stock ownership of Pipeco). "In short, our task is to carefully scrutinize and weigh elements of both power and temptation, and, from this overall appraisal, determine the proximity of the danger that a remote financial interest will infect the bargaining process." *H. P. Hood & Sons*, 182 NLRB 194 (1970).

The judge found the above-mentioned violations of Section 8(b)(1)(A) and (2) solely in the Union's ownership of 25 percent of Pipeco's outstanding shares of stock. But the judge noted it is undisputed that the Union's sole motivation in its purchase of shares in Pipeco was to improve employment opportunities for its membership and that the Union took steps to remove itself from any control or influence over the business of Pipeco. The record evidence clearly establishes that the Union under its stock purchase agreement with Pipeco had to sell its stock interest 3 years after purchase. The Union assigned to Pipeco's corporate attorney its proxy, voting rights, and any other rights it possessed by virtue of its 25-percent ownership interest. No officer or representative of the Union has held or holds office in Pipeco or its board of directors, nor has the Union made such a request. The Union has never exercised or attempted to exercise any managerial rights. The Union has never influenced or attempted to influence any managerial decision. The Union has never requested to be consulted on any managerial decision. Furthermore, the executed collective-bargaining agreement does not grant Pipeco any special treatment and calls exclusively for prevailing wage rates and fringe benefits. Based on these facts, the Union effectively has divested itself from the management of the company to such an extent that, even if tempted, it would be powerless to "infect the bargaining process."[5]

Therefore, we will dismiss so much of the consolidated complaint as alleges violation of Section 8(b)(1)(A) by the Union's acceptance of recognition from Pipeco, and its execution of a collective-bargaining agreement with Pipeco, and of Section 8(b)(2) in the Union's execution of a union-security agreement with Pipeco, and its entrance into an agreement with Pipeco requiring the payment of dues and other payments to the Union for pension and benefit funds. The judge also found, though not alleged, that the Union violated Section 8(b)(2) of the Act by the execution of a collective-bargaining agreement with Pipeco which contained a referral clause. Inasmuch as we have found that the Union and Pipeco lawfully entered into a collective-bargaining agreement, we shall reverse this finding also.

[4] See *Oregon Teamsters' Security Plan Office*, 119 NLRB 207, 211 (1957); *Anchorage Community Hospital*, 225 NLRB 575, 576 (1976).

[5] The steps taken by the Union here to divest itself of actual or potential control of Pipeco in order to avoid any conflict of interest distinguishes the instant case from the Board's decision in *St. John's Hospital*, 264 NLRB 990 (1982). In *St. John's* the union, the California Nurses' Association (CNA), operated a nurse registry which the Board found was an employment referral service. The Board, quoting *Bausch & Lomb Optical*, supra at 993, found that "CNA's financial interests in maintaining and enhancing its customers' relationship with the Employer has created an 'ulterior purpose' that conflicts with the requirement that a collective-bargaining agent have a 'single-minded purpose of protecting and advancing the interests' of unit employees." Because of the conflict of interest, the Board dismissed the union's representation petition.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(b)(1)(A) of the Act by threatening not to refer for employment, and refusing to refer for employment, employees because of their intraunion political activity, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. We shall order the Respondent to make whole Dan Michael, Carl Schlemmer, and Billy H. Belt for any loss of earnings they may have suffered as result of the Respondent's failure to refer them for employment. Earnings are to be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Local Union No. 553, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, East Alton, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to refer employees for employment with employer members of the Plumbing, Heating, Piping and Air Conditioning Contractors Association of Alton, Wood River and Vicinity because they engaged in intraunion political activities.

(b) Refusing to refer employees for employment with employer members of the above-mentioned Association because they engaged in intraunion political activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Carl Schlemmer, Dan Michael, and Billy H. Belt whole for any loss of earnings or other benefits they may have suffered due to the Respondent's unlawful refusal to refer them for employment, paying each of them a sum equal to what he would have earned absent the unlawful conduct less any net interim earnings plus interest, as provided in the section of this Decision entitled "Amended Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all records pertaining to employment through its hiring hall, and all records relevant and necessary for compliance with this Order.

(c) Post at its business office in East Alton, Illinois, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten not to refer employees for employment with employer members of the Plumbing, Heating, Piping and Air Conditioning Contractors Association of Alton, Wood River and Vicinity because they engaged in intraunion political activities.

WE WILL NOT refuse to refer employees for employment with employer members of the above-mentioned Association because they engaged in intraunion political activities.

WE WILL NOT in any like or related manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Carl Schlemmer, Dan Michael, and Billy H. Belt whole for any loss of earnings or other benefits they may have suffered due to our unlawful refusal to refer them for employment, plus interest.

LOCAL UNION NO. 553, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was tried at St. Louis, Missouri on June 8, 9, and 10, 1981, on the second amended consolidated complaint and notice of hearing issued April 22, 1981, by the Regional Director for Region 14, and alleges that Local Union No. 553, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).[1] The complaint is joined by the Union's answer filed April 23, 1981, wherein it denied the commission of any violations of the Act.

The complaint alleges that the Union operates an exclusive hiring hall as the sole source of employees for employer members of the Plumbing, Heating, Piping and Air Conditioning Contractors Association of Alton, Wood River and Vicinity in the State of Illinois (Association), and that the Union has violated Section 8(b)(1)(A) of the Act by threatening certain of its own members that they would not be referred for employment because of their engagement in "intra-union activity and/or for other unfair, arbitrary, invidious reasons."

The complaint alleges that since about November 6, November 6, and November 21, 1980, respectively, the Union has failed and refused, and continues to fail and refuse, to refer to employment with employer members of the Association, Charging Party Michael, Charging Party Schlemmer, and Charging Party Belt, and that Respondent engaged in this conduct because Charging Parties Michael, Schlemmer, and Belt engaged in "intra-union activity and for other unfair, arbitrary and invidious reasons" and that Respondent thereby violated Section 8(b)(2) and (1) of the Act.

The complaint further alleges that the Union violated Section 8(b)(1)(A) and (2) of the Act by its execution and maintenance of a collective-bargaining agreement with Pipeco Fabricating Company (Pipeco) while Pipeco "did not employ a representative segment of its ultimate employee complement" and by its engagement in the representation of employees of Pipeco at such times as it "has a substantial ownership interest in Pipeco."

On the entire record in this case, including my observation of the demeanor of the witnesses, and after due consideration of the positions of the parties, I make the following

FINDINGS OF FACT AND ANALYSIS[2]

I. JURISDICTION

The complaint alleges and the Union admits in its answer, as amended at the hearing, and I find, that Plumbing, Heating, Piping and Air Conditioning Contractors Association of Alton, Wood River and Vicinity in the State of Illinois is an organization composed of employers engaged in the construction industry and existing for the purpose of representing its employer members in the negotiation and administration of collective-bargaining agreements with various labor organizations, including the Union. The complaint alleges, the Union admits in its answer, as amended at the hearing, and I find that the Association and its members thereof, including France Plumbing, Heating and Air Conditioning and Murphy Company, were, at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Union admits, in its answer, as amended at the hearing, and I find that Pipeco was, at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the Union admits in its answer, and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background of the Union's Referral Process*

The Union maintains its business office in East Alton, Illinois, and has approximately 430 members of the plumbing and pipefitting trade of which only 80 members were active in the trade at the time of the hearing. The Union has executed a collective-bargaining agreement with the Association effective from July 1, 1980, to June 30, 1981, and continuing thereafter from year to year unless written notice of termination thereof is given by the other party 60 days prior to the expiration date (G.C. Exh. 9). Under the terms of this agreement, the Union operates as an exclusive hiring hall in referring out applicants for employment with employers who were signatories to the agreement. Article XX of this agreement sets out a "Referral Procedure." This procedure requires applicants for referral to complete a referral application on the first workday of each week. To maintain eligibility for referral, article XX requires that an applicant for referral "renew his referral application weekly by giving notification to the Union of intent for renewal on the first work day of each week." Applicants are to "furnish such data, records, name of employers and licenses as are deemed necessary" and to "set forth in their application for referral any special skills they may possess." Applicants register as either journeyman plumbers or journeyman pipefitters. Applicants are to be referred for employment on the basis of three priority groups based on length of employment within the Union's jurisdiction as journeymen with employers who are party to the agreement.

[1] The charge in Case 14-CB-5290 was filed by employee Dan Michael on February 5, 1981; the charge in Case 14-CB-5290-3 was filed by employee Carl Schlemmer on February 13, 1981; the charge in Case 14-CB-5316 was filed by employee Billy H. Belt on March 2, 1981. The amended charge in Case 14-CB-5333 was filed by employee Rickey A. Minor on April 16, 1981.

[2] The following includes a composite of the testimony of the witness at the hearing, which testimony is credited except as specific credibility resolutions are made.

Article XX also provides for consideration to be given to contractor requests for supervisors, foremen or general foremen and for particular employees by name and for "bona fide requests by contractors for plumbers and pipefitters with special skills and abilities."

The undisputed evidence as derived from the testimony of Union Business Manager Joseph L. (Bill) McGhee, and as corroborated by Assistant Business Manager Jerry Kline and Assistant Business Agent Reggie Sparks, disclosed that the Union does not maintain a written registration list of applicants for employment and does not follow the order of priority set out under article XX of the agreement. Rather, the Union maintains cards for each member and apprentice and lists thereon various employers to which they have been referred, the dates of referral and the date of the last day of work with the employer. The cards of members who are working are kept in alphabetical order in a working file. Cards of members who are not working are kept in the rear of the working file. The Union also prepares a weekly out-of-work sheet listing its members who are out of work and who are available for employment. These sheets do not list the unemployed members in any sequence or order of priority for referrals and are destroyed at the end of each week.

Members do not register on the first day of each week to maintain their eligibility. Rather, they are required to contact the union office after their termination or layoff from a job and to notify the Union of their availability for referral. This is normally done by placing a telephone call to the union office and giving the information to the Union's secretary or to one of the Union's business agents. The members' cards are then placed in the out-of-work section. There are instances in which a member is unemployed but does not indicate his availability for employment to the Union and is considered "not ready" for employment. When a member is referred out to a job, his card is removed from the out-of-work section and placed in the working file. The card files are maintained under the control of McGhee and assistant business agents appointed by him.

McGhee testified at length concerning the referral process employed by himself and the Union's business agents. He testified that the Union refers its members out on the basis of their qualifications to perform the job required by the contractor. He testified that members would be referred out on the basis of their availability for employment in the event there are equally qualified members for a job. McGhee testified that, when contractors request the Union to make referrals, the contractors apprise the Union of the job requirements and the type of skills required for a particular job and then he and the Union's business agents refer those members available for employment who possess the requisite skills and abilities. McGhee testified concerning special needs of contractors such as supervision, various types of welding skills and employees capable of performing instrumentation work, among other requirements. Additionally, members Michael, Schlemmer, and Belt testified concerning various skills within the plumbing and pipefitting trades possessed by some members but not by others.

It was clear from the testimony of the witnesses for both parties that there are varying levels and types of skills within each of the two trade classifications (plumbers and pipefitters), and that many, if not most, members cannot perform all of the work encompassed under their designated classification (i.e., Belt testified he is a certified welder, but is not qualified to perform all types of welding. Schlemmer testified concerning limitations on his ability to do "troubleshooting" with respect to refrigeration work and that he was not qualified to do "downhill welding" on a pipeline.) However, with the exception of a few areas (such as a plumbing license and certain welding certifications and welding tests performed by the contractors), there appeared to be no objective set of criteria or standards by which a member's capabilities to perform various types of work could be judged. Rather, these determinations are made by McGhee and the Union's business agents on the basis of their subjective judgments. Although it was apparent from the testimony concerning varying capabilities of the Union's members that not all journeyman plumbers and/or pipefitters could perform all aspects of the jobs required by the contractors, the subjective judgments of McGhee and the Union's business agents were derived from varying sources such as personal observations (many of which were made years prior thereto) and sporadic informal reports from contractors and from other members serving as foremen on jobs. McGhee testified he normally received these reports only on members who performed particularly well or particularly unsatisfactorily. Mally received these reports only on members who performed particularly unsatisfactorily.

B. *The Alleged Unlawful Threats by the Union to Members Michael and Schlemmer that It Would Refuse to Refer Them for Employment and the Alleged Refusal and Failure of the Union to Refer Michael, Schlemmer, and Belt to Work*

Charging Party Michael is a journeyman plumber-pipefitter member of the Union qualified to do almost all types of work with the exception of welding and refrigeration repair. He had been a member of the Union for over 20 years at the time of the hearing. He has served as a foreman and general foreman on occasion and has also served as a union steward on construction jobs. From March 1973 to December 1977 he "held the position of financial secretary-treasurer and . . . was also administrator and trustee [of] the [Union's] pension and welfare funds." He left his union office on January 1, 1978, and thereafter worked for a succession of contractors. He worked in Arizona at his request from January to April 1980, and returned to Illinois in April 1980. Prior to his trip to Arizona, union member James H. Ewing Sr. contacted him and discussed with him the formation of an opposition slate of candidates in the Union's next election scheduled for December 1980 to oppose the slate of candidates headed by incumbent Business Manager McGhee. The candidates campaign as a slate, but were elected individually. Upon this return to the Illinois area in April 1980, Michael discussed the matter further with Ewing and with union member Jerry Kline. Ulti-

mately an opposition slate headed by James Ewing Sr. was formed to oppose the groug of candidates running on the slate headed by McGhee. Kline announced his candidacy for assistant business manager in the spring of 1980. Ewing announced his candidacy for business manager in August 1980. Kline was formally nominated for the position of assistant business manager by Michael at the November 1980 nominations meeting.

Charging Party Belt is a journeyman plumber-pipefitter and had been a member of the Union for over 20 years at the time of the hearing. Belt is a certified welder, but is not qualified to perform all types of welding. He is not a licensed plumber. On November 6, 1980, Belt accepted a nomination to run for elective office as a member of the Union's examining board on the slate headed by Ewing. Belt had announced his candidacy for this position in April 1980.

Charging Party Schlemmer is a journeyman pipefitter and has been a member of the Union since December 1964. He testified he does not do plumbing work, but is qualified to do welding and refrigeration work but not to do "troubleshooting." He has performed pipeline work and has worked in a fabrication shop. He is capable of working as a pipefitter on a pipeline, but does not qualify to do "downhill welding" on a pipeline.

Michael, Belt, and Schlemmer testified without contradiction that they actively campaigned for the Ewing slate. Michael, Belt, and Schlemmer each engaged in the placing of telephone calls to the Union's members and talked to members at various locations whenever they met them in support of the Ewing slate. Michael has not been regarded as a supporter of McGhee in the past. McGhee testified at the hearing that he expected that Michael would support the slate of candidates opposing himself. Schlemmer has been an outspoken opponent of McGhee in the past and discussed the formation of an opposition slate to oppose the McGhee slate in the presence of others in March and April 1980 and on one occasion in the presence of McGhee's son. In addition, Schlemmer has encountered some difficulties on the job in the past and had been told by McGhee in June 1980 to improve his performance. I credit McGhee's version of this conversation rather than Schlemmer's version. This conversation apparently followed a period during which Schlemmer was unemployed. Schlemmer was subsequently referred out to a new job the day following the conversation.

On November 3, 1980, Schlemmer reported for work at 7 a.m. to Strange and Coleman (a mechanical construction contractor) on a Shell Oil Refinery job where he had worked since July 1980. According to Schlemmer, his work partner was not at work that morning, and Cecil Crosnoe (Schlemmer's foreman on the job) told Schlemmer that he was going to assign him to work with a black. Schlemmer then stated that he had a trip planned and was going to take it. At his request, Schlemmer was driven to the gate of the construction site and left. Subsequently, at the union meeting held on November 6, 1980, Schlemmer was approached by Lindell Johnson, the general foreman of the Shell Oil Refinery job, and Johnson handed Schlemmer his check and told Schlemmer that he had been laid off. Schlemmer refused the check and told Johnson he would "be at work in the morning." Schlemmer testified that he appeared at work the following morning and Johnson "handed me that same check." Schlemmer testified he asked Johnson, "Well, who is doing this, you or who?" and that Johnson replied, "Bill McGhee." Neither Crosnoe nor Johnson was called as a witness in this proceeding.

Schlemmer testified that at this point he left the premises, went home, and called McGhee on the telephone. He was unable to contact McGhee immediately. However, later that day he returned his call, and Schlemmer asked, "What's is going on?" McGhee stated, "I don't have any work for you," and hung up. Schlemmer testified that he was not again referred out for work until April 6, 1981. After the November 7, 1980, incident, Schlemmer contacted the Union on several occasions concerning referrals. On November 22, 1980, he presented his unemployment card to Assistant Business Agent Reggie Sparks who signed it under the category "No work available" and returned it to Schlemmer. The word "No" is also checked under the category "Did worker refuse work." Schlemmer also presented his card at the Union's office on March 10, 19, and 27, 1981. On each occasion the card was returned to Schlemmer and signed, indicating work was not available and that Schlemmer had not refused work (G.C. Exh. 16).

On January 6, 1981, Union Assistant Business Manager Jerry Kline, who was elected in the December 1980 election, telephoned Schlemmer and told him that he wanted to talk to him. Schlemmer had been a supporter of Kline, and testified that he had been hopeful that he would be sent to work once again in January or February 1981. Schlemmer met with Kline at Kline's home on January 6, 1981. Schlemmer testified that Kline told him, "Shorty, I cannot send you to work. Bill McGhee is mad. I had a meeting with him, and he won't let me refer anybody." Schlemmer testified that Kline also told him that at this meeting McGhee had stated, "That goddamn Shorty Schlemmer brought in Hamor and Bodine for this election," and "I will die and burn in hell before Shorty Schlemmer goes to work." Schlemmer testified that he had bought an airline ticket for member Bob Hamor who lives and works in Minnesota in order that Hamor could vote in the election.

Member Jerry Kline was elected in the December 1980 election as assistant business manager and assumed office on January 8, 1981.

Kline, who was initially called by the General Counsel and examined pursuant to Section 611(c) of the Federal Rules of Evidence, corroborated Schlemmer's testimony. Kline testified he could not recall the exact words McGhee had used, but McGhee made it clear that "Schlemmer was not going to work in this local." Kline was recalled on rebuttal by the General Counsel and placed the conversation with Schlemmer on January 6, 1981. Kline testified that McGhee had stated that he "would die and burn in hell before this man would ever work in this local again."

McGhee testified concerning his conversation with Schlemmer on November 6 that the conversation was short, that he told Schlemmer he had no work available

for him, that Schlemmer asked him the reason for his discharge from the job at Strange and Coleman, and that he (McGhee) informed Schlemmer it was because he had refused to work with a black. McGhee also testified concerning the conversation with Assistant Business Manager Kline and placed that conversation on January 2 rather than January 6, 1981.[3] McGhee denied telling Kline that he would burn in hell before Schlemmer would work again in the Union, but did admit telling Kline that he did not appreciate Schlemmer's having brought members Hamor and Bodine to vote in the December election. He also acknowledged telling Kline that he would not refer Schlemmer for work if Schlemmer "did not improve his performance." McGhee testified that Schlemmer had been reported drinking on the job and that McGhee did not want to jeopardize the Union's position with the contractors on the Shell Oil Refinery job by tolerating that type of activity. McGhee denied telling Kline that he would not refer Schlemmer out because Schlemmer had brought members Hamor and Bodine to vote in the December election. McGhee admitted on cross-examination that he had made a determination that he would not refer Schlemmer out until such time as he improved his performance. McGhee also admitted that he did not contact Schlemmer or explain to Schlemmer that he was not being referred out because of his job performance. Schlemmer was not referred again to a job until April 6, 1981.

Gary Schumacher, a vice president of Strange and Coleman, testified that he had observed Schlemmer's performance approximately 6 to 8 years ago. Schumacher stated that Schlemmer was discharged in November 1980 by Strange and Coleman from the Shell Oil Refinery job. Schumacher testified he was not directly involved with the matter, but that Strange's and Coleman's project manager, Jim McGraw, and General Foreman Wendell Johnson, who were on the job, were involved. Neither Johnson nor McGraw was called to testify. Schumacher's knowledge therefore was derived from a report he received from McGraw that Schlemmer had been discharged for refusing to work with a minority employee. Schumacher testified that the decision to terminate Schlemmer was made by General Foreman Wendell Johnson, who then conferred with Project Manager McGraw, and that Schumacher received a report on that termination the same day. Schumacher testified that he directed a letter to the Union stating that Strange and Coleman would appreciate the Union's "cooperation in not referring Mr. Schlemmer to any of our jobs." This letter was written by Schumacher on February 20, 1981, after a conversation with Assistant Business Agent Reggie Sparks wherein he expressed his Company's opposition to further referrals of Schlemmer, and Sparks requested that he put the matter in writing. Schumacher also testified concerning an incident involving Schlemmer's drinking on the job approximately 3 years prior to the hearing date.

[3] I find McGhee's recall of the date more reliable than Kline's recall. I do not, however, regard the placement of the date as either January 2 or 6 as material herein.

Michael testified that, prior to his return from Arizona in April 1980, he telephoned McGhee and told him that he had finished his job in Arizona. McGhee told him to return to the area, which Michael did. Shortly after Michael's return, he was referred to a job with the Pennington Equipment Company in Whittfield (Illinois) and worked there until sometime in June 1980 when he was laid off when the job was finished. He then called the union hall and told the secretary that he was out of work. This was procedure normally followed by union members to indicate that they were out of work and were ready for additional referrals. Michael testified that it is not necessary to speak to one of the agents, but rather is sufficient to notify the secretary. Michael testified that he was not referred out for a "couple of days," and found out that two other individuals whom he had been working with on the prior job had been referred out. Michael then called the union hall and talked to Sparks, who told him that McGhee would be in touch with him. Michael waited an additional few days and then called and talked to Sparks, who again told him that "McGhee knew I was out of work and he would be in touch." Michael testified that he then stated, "Well, I either go to work or I go to the Labor Board, one or the other." Michael testified that "a couple days later" McGhee telephoned him at home and asked Michael about his statement that he would go to the Labor Board. Michael testified he stated, "That's just exactly what I said and that's exactly what I mean," and that McGhee then stated, "If that's where you're going to get your job, that's where you can go to get all of them. I gave you a job when you got back here from Arizona and you started up a lot of trouble about elections coming up and you got a lot of men stirred up. . . . I don't have anything for you." Michael testified that he then told McGhee, "I either get a job or I go to the Labor Board," and that "When I come over here, we're going to talk about how you're running the hiring hall, too. We'll talk about more than just my job," whereupon McGhee stated, "I'm running the hiring hall right." Michael retorted that McGhee was not. McGhee then stated, "All right, I'll call you tomorrow." Michael testified that the following day he received a telephone call to report for work and was referred to a job for Triangle Heating in Evansville (Illinois).

Michael testified he had worked for Albers Refrigeration for some time prior to December 1980, and that in December 1980 the refrigeration units were set and piped in. It was necessary to wait for electricians to wire the compressors in order that the compressors could be turned on and charged to test the units, which would required a delay of approximately 2 weeks. Michael testified that Robert Albers told the three employees who were working that he would not single out anyone for a layoff, but would keep them although the job was basically finished. Michael stated that he then told Albers that he was planning on taking his daughter to California for a vacation and, if there was no more work, he would prefer to be laid off, whereupon Albers agreed and did lay him off on December 16, 1980. Michael testified he left for California the next morning. Michael returned on

January 3, 1981, and called the Union's office to report his availability for work on Monday, January 5, 1981, to the secretary.

Michael was not referred out again until January 20, 1981, when he was referred out by Assistant Business Manager Jerry Kline to Diestlehorst (a contractor.) On January 26, 1981, Michael was working in Jerseyville (Illinois) for Diestlehorst. Kline came to the job and told Michael, "Well, the shit hit the fan this morning . . . . Bill [McGhee] found out I sent you out to work," and that McGhee had stated, "Dan Michael is not going to work here. He quit his last job and went to California and he can just stay there. He's not going to work here and you're not going to send anybody else out for work."

Michael testified that he attended a union meeting on February 5, 1981, at which Kline reported that he had been told not to refer anyone out to work, but that Kline informed the membership that he intended to refer people out if there were jobs available and membership were out of work. Michael testified that McGhee also spoke at that meeting and stated that "as business manager of the local union that he [McGhee] would run the local union his way and Jerry Kline would do as he told him" Michael testified that he was actually referred to Diestlehorst on January 20 (1981), but did not start work until a few days later because of inclement weather. He worked for Diestlehorst approximately 5 days, and was then referred to another job for 3 days. Michael testified that he was not referred to another job from approximately February 2, 1981, until his referral to Diestlehorst approximately February 26. Michael testified that he was offered another job by Assistant Business Representative Mike Carson, which was an overtime job he refused. Michael filed his charge in the instant case on February 5, 1981. Michael testified that there had never before been an opposition slate in an intraunion election campaign since he had been a member.

Kline testified that on approximately January 20, 1981, he spoke with McGhee concerning Michael when McGhee called Kline into his office and told Kline that "I did not have the authority to send people to work," and that McGhee had found that Kline had referred Michael to a job. Kline testified that, at the time of the referral, he did not find Michael's card in the work file, made a new card for Michael, and put it in the file so it could be found by other agents. Kline testified that McGhee told him if any cards were not in the box, the card would be on his desk, and that if the card was on his desk, no one was to send the member to work.

At the time McGhee told Kline he was not to refer anyone else to work. Kline testified that McGhee referred to the last job which Michael had been on, and McGhee stated that Michael had quit the job and left for California and that Michael could stay in California as McGhee did not have any work available for him. Kline acknowledged having told Michael of McGhee's statement concerning Michael. Kline acknowledged that he had told Michael "the shit hit the fan today," and that "I said McGhee had found out about my sending you to work, and he really came down hard on me, something to that effect, because he didn't want me sending you out. He said I wasn't ever to send anybody else out again," and "I said what we are going to have to do is be careful, because I don't know how the man is going to react." Kline admitted having told Michael that McGhee had stated that "Michael is not going to work."

The General Counsel also called Robert Albers. Albers testified that Michael worked for him from September until December 16 (1980). Albers testified that the job was concluding and that a layoff was necessary and, accordingly, Michael left and went on his vacation. Albers testified that Michael gave him advance notice that he was leaving and offered to stay until the job was finished. Albers further testified that Michael was laid off because he was the last man to be obtained of the three men on the job.

McGhee acknowledged the conversation between himself and Jerry Kline which he placed at approximately a week or so after Kline came to work in the union office (January 8, 1981), and also acknowledged that he had Michael's card on his desk. McGhee testified that it been reported to him that Michael had quit a job to go on vacation which left an opening the Union was unable to fill. As a result, 4 or 5 days' work had been lost to its members. McGhee testified that he put Michael's card on his desk so that the other agents would not refer him out while he was gone. McGhee denied having received information of Michael's return from California and that Michael was ready for referrals. McGhee testified that he asked Kline why Michael had been referred out, and Kline told him that Michael had called him and he had, therefore, sent him out. McGhee testified that he then told Kline that, when a card was on his desk, the man was not to be referred out as there may be a number of reasons why he should not be referred out such as a person being on vacation or being required for another job. McGhee was unable to state whether other persons were out of work at the time Kline referred Michael to the job. McGhee acknowledged telling Kline that he was not to refer anyone else out at the time of the conversation concerning Michael's referral. McGhee denied having ever made the statement to Kline or to Michael or to anyone else that, by reason of their union political activities, they were not eligible for referrals. He also denied giving instructions to any of his business agents as to whether any individual should or should not be referred out because of their political activities. McGhee also testified that Michael called him shortly before his returning from Arizona in 1980 and asked if McGhee would refuse to refer him for employment "because of his political convictions," and that McGhee replied in the negative, told Michael to return and that McGhee would have a job for him. McGhee testified that, shortly thereafter, Michael was off from work for a short period of 3 or 4 days and told Sparks that he (Michael) would go to the National Labor Relations Board. McGhee testified that he subsequently referred Michael out to another job, but not because of his threat to go to the National Labor Relations Board.

Belt testified that he was laid off from a job on December 20 (1980); he contacted Agent Reggie Sparks and told him that he had been laid off and was available for

work. Belt subsequently contacted the union hall once a week. He was not referred to work again until January 26 (1981) when he was referred to a job in Cape Girardeau (Missouri), where he worked for approximately 5 weeks until February 27 (1981). Cape Girardeau is a distance of 237 miles from his residence in Carlinville, Illinois. Belt contacted the union hall the following Monday, March 2 (1981), went into the office, talked to McGhee, and told him he had been laid off. McGhee told him, "We'll pull your card."

McGhee testified that Belt had been laid off and had called the office inquiring about employment. McGhee testified this occurred in either December 1980 or January 1981. McGhee testified he told Belt that as he had noted in previous union meetings, they were anticipating a period of unemployment much greater than had been experienced in the past 10 or 12 years. McGhee testified that Belt stated he needed employment, that he had heard there was work in Paskel, Washington, and asked for a referral card to Paskel. McGhee offered to check this prior to Belt's leaving the area and did so. He was informed that there were over 200 men there to cover the available jobs. McGhee testified he then offered to attempt to get Belt a job with another union local (Local 552), and that this particular job was in Cape Girardeau.

The Union's referral cards (G.C. Exh. 20) show that numerous members were referred out for employment (some on two or more occasions) who became eligible for work after each of the Charging Parties. Thus, in the case of Schlemmer, although he requested work on November 6, 1980, he was not referred out again until April 6, 1981. During this period numerous members of Respondent were referred out to other jobs. Some of these members, as pointed out by General Counsel in his brief, received substantial numbers of referrals, including member Rogers who, through a series of referrals, was employed for substantially the entire period during which Schlemmer was unemployed.

The General Counsel notes in his brief that nine members who became available for work after January 5, 1981, the date that Michael contacted the union hall, were referred out ahead of Michael. The General Counsel also points out in his brief that, although Belt telephoned the Union on December 22, 1980, to indicate his availability for work and was told that no work was available, and although he was not referred out once again until January 26, 1981, several members (approximately 20) became available for work after December 22, 1980, and received referrals prior to January 26, 1981. Belt testified that he was capable of performing the same work as these members. His testimony was unrebutted in this regard. Additionally, approximately four of these members received two referrals during this period. Although Belt reported his availability on March 2, 1981, he was not referred out until April 6, 1981, although during this period approximately 14 members were referred out prior to Belt even though they had been unemployed for a lesser period than Belt.

III. ANALYSIS OF THE ALLEGED THREATS AND REFUSALS TO REFER

A. *The Alleged Threats Made to Employees Schlemmer and Michael*

I credit the testimony of Kline and Schlemmer concerning the events of January 1981, and find that Kline's statement to Schlemmer that McGhee had declared that Schlemmer would not be referred for work constituted a violation of Section 8(b)(1)(A) of the Act by the Union. Although it is clear that Kline was not the initiator of the threat but acted rather in the role of conveying to Schlemmer what Kline had been told by McGhee, Kline's statement to Schlemmer was nonetheless coercive in nature and a threat that Schlemmer would not be referred out because he had engaged in intraunion activities. This threat was clearly violative of Schlemmer's rights under Section 7 of the Act. See *Sheet Metal Workers Local 28 (Treadwell Corp.)*, 243 NLRB 1061 (1979), and *Stage Employees IATSE Local 7 (Universal City Studios)*, 254 NLRB 1139 (1981). Kline's subjective intent is not relevant in determining whether his statements tended to restrain or coerce Schlemmer in the exercise of his rights under Section 7 of the Act. See *Laborers' Local 496 (Newport News)*, 258 NLRB 1105 (1981). I find that, as an elected official (the assistant business manager) of the Union, Kline was an agent of the Union within the meaning of Section 2(11) of the Act. I find that he was in a position of apparent authority, and I do not find relevant or determinative his lack of formal installation at the time he made the statement to Schlemmer. Rather, it is clear that Kline was functioning as a representative of the Union when he made the statement to Schlemmer, having learned of McGhee's position regarding Schlemmer at the time of his initial meeting with McGhee concerning Kline's own duties as an assistant business manager. I also do not find relevant or determinative the Union's argument that Kline was not representative of or an agent of the Union by reason of his opposition to the McGhee slate of candidates. See *Teamsters Local 1780*, 244 NLRB 277 (1979), and *Peninsula Shipbuilders' Assn. (Newport News Shipbuilding Co.)*, 239 NLRB 831 (1978).

I also credit the testimony of Kline and Michael concerning the statement made by Kline to Michael on the jobsite that Michael was not to be referred out for future employment because he had allegedly quit a job prematurely to leave for vacation in California, according to McGhee. I find that Kline was acting in his official position as an installed assistant business manager and was an agent of the Union within the meaning of Section 2(11) of the Act. The threat conveyed by Kline to Michael was a threat to refuse to refer Michael for employment because of his having engaged in intraunion activities and was clearly violative of Michael's rights under Section 7 of the Act, and the Union thereby violated Section 8(b)(1)(A) of the Act. See *Sheet Metal Workers Local 28* and *Stage Employees, IATSE Local 7*, both cited above. The circumstances of this case clearly demonstrate that Michael was a longstanding political opponent of McGhee, actively supported the opposition to the McGhee slate in the December election, and that

McGhee seized on the pretext as a reason for refusing to refer Michael for future employment. I credit Michael's testimony as supported by that of Albers concerning the circumstances of his leaving the job. It is clear that McGhee's actions in threatening to preclude Michael from further referrals rather than discussing with Michael or Albers the circumstances of Michael's termination from the job were motivated solely by McGhee's desire to retaliate against Michael for his engagement in intraunion activity rather than by any genuine belief that Michael had left the job prematurely.

B. *The Union's Alleged Failure or Refusal to Refer Charging Parties Michael, Schlemmer, and Belt for Employment in 1980 and 1981*

The operation of the Union's referral system is in issue in this proceeding insofar as it relates to its impact on the Charging Parties. Although I credit McGhee's testimony concerning the varying types and levels of skills within each of the two journeyman classifications, the lack of readily ascertainable objective standards of the capabilities of members to perform various jobs required by the contractors makes difficult an assessment of the criteria utilized to refer members for employment.

In the case of Schlemmer, it is undisputed that from approximately November 6, 1980 to April 6, 1981, he received no referral for work although he indicated his availability for work. During this period numerous other members were referred for work and many on more than one occasion. Union Business Manager McGhee admitted he had made a decision to refrain from referring Schlemmer for employment until he improved his performance after the November 1980 incident when Schlemmer left his job with Strange and Coleman.[4] Moreover, admittedly McGhee did not notify Schlemmer that he was not to be referred for employment until he improved his performance The Union contends that Schlemmer's unsatisfactory job performance was the sole reason for McGhee's refusal to refer him for employment after the November incident. In support of its position, the Union cited alleged instances of Schlemmer's drinking on jobs. However, the Union produced direct evidence of only one incident of drinking on the job several years prior to the November 1980 incident through the testimony of Strange and Coleman Vice President Schumacher. In January 1981, Schumacher wrote a letter to the Union at the suggestion of Union Business Agent Sparks when Schumacher expressed the reluctance of Strange and Coleman to employ Schlemmer again as a result of the November 1980 incident and Schlemmer's alleged drinking (alcohol) on the job. However, this letter was written substantially after McGhee's refusal to refer Schlemmer for employment, and I do not find that it had any relevance to McGhee's decision. Under the above circumstances, I find that McGhee's action in refusing to refer Schlemmer for employment was arbitrary and capricious and was not consistent with any purported attempt to have Schlemmer improve his performance, particularly in view of McGhee's failure to notify Schlemmer that he was no longer to be referred for employment as a result of his job performance. I find probable, from the testimony of McGhee and Schumacher concerning Schlemmer's performance, and from the testimony of Schlemmer himself, that Schlemmer may well have not performed in a satisfactory manner in the past. I also recognize that unsatisfactory conduct, such as drinking on the job, will not be tolerated by contractors and that the Union has a legitimate concern in referring for employment members who are capable and willing to perform in a satisfactory manner.

I also credit Kline concerning McGhee's statement that Schlemmer would not again work in the Union's jurisdiction as a result of his intraunion activities in bringing members Hamor and Bodine to vote in the December 1980 union election. Although I recognize that Kline ran on the slate opposing McGhee's slate and that his recall of the statements made by McGhee concerning Schlemmer was not initially as specific as it later became after his recollection was refreshed by Schlemmer's testimony, I found Kline a credible witness and also consider it unlikely that he would fabricate the statements made by McGhee concerning Schlemmer. McGhee himself admitted having expressed his displeasure to Kline concerning Schlemmer's having brought members Bodine and Hamor to vote in the December elections, although he denied making statements that Schlemmer would not work because of this.

Under the above circumstances, I find that McGhee's actions in refusing to refer Schlemmer for employment following the November 1980 incident were arbitrary and capricious and were motivated principally by McGhee's displeasure with Schlemmer's engagement in intraunion activities in campaigning for the slate of candidates opposing McGhee and his slate of candidates.

I also find that Michael suffered discrimination by the Union's failure and refusal to refer him for employment in the months of January and March 1981. McGhee's withholding of Michael's card from the out-of-work file after Michael notified the Union's secretary of his availability for work was demonstrative of McGhee's hostility toward Michael. I credit Michael's unrebutted testimony that he notified the secretary for work. I do not credit McGhee's testimony that he did not believe Michael was available for work or that he believed Michael had prematurely quit his job. I credit Kline's version of McGhee's statement that Michael could stay in Califor-

[4] The General Counsel neither alleged in the complaint nor contended at hearing nor in his brief that the discharge of Schlemmer was unlawful. Moreover, the individuals involved in the November 1980 incident (the black employee with whom Schlemmer allegedly refused to work with or Foreman Crosnoe, General Foreman Johnson, or Project Manager McGraw) were not called to testify. Schlemmer testified that he was told he would be required to work with a black, that he left the job because he had previously decided to go on a trip, and that he could use the time to get ready and was thereafter terminated from the job. General Foreman Johnson told him McGhee was responsible for his termination.

I did not have the impression that Schlemmer was being candid in his relation of the incident. Rather, I found Schlemmer's account of this incident to be vague and lacking in detail. I do not base any determination on the hearsay testimony of McGhee and Schumacher. Schlemmer's refusal to work with a black employee appears to be the only plausible explanation for his conduct in leaving the job, even if I were to credit Schlemmer's account in its entirety. Accordingly, I find that there is no evidence of any violation of the Act by the Union by the termination of Schlemmer from the Strange and Coleman job in November 1980.

nia. I find that McGhee's refusal to refer Michael out for work at a time when other employees were being referred out for work was motivated solely by McGhee's displeasure with Michael's intraunion activity in opposing the candidacy of McGhee and his slate in the November election.

Similarly, I find that the disparity between the lack of referrals by the Union of Belt at a time when other members were being referred for work during the period from December 1980 to April 1981 was motivated solely by McGhee's attempt to retaliate against Belt because of his engagement in intraunion activities as a candidate for election and a supporter of the slate opposing the McGhee slate. In this regard, Michael, Schlemmer, and Belt each testified that they were capable of performing the same work as many other members who were referred for employment during their own periods of unemployment. I credit their testimony which was essentially unrebutted.

Under the above circumstances, I find that the Union, through its Business Manager McGhee, whom I find to be an agent of the Union within the meaning of Section 2(11) of the Act, violated Section 8(b)(1)(A) and (2) of the Act when it failed and refused to refer for employment its members Michael, Schlemmer, and Belt as a result of their having engaged in intraunion activity protected under the Act. A union that operates a hiring hall under the construction industry proviso contained in Section 8(f) of the Act is empowered with an important trust to operate its referral system in a fair and nondiscriminatory manner. Its actions with respect to the operation of the referral of its members affect their very livelihood, as was amply demonstrated in this case and, most particularly, in the case of Schlemmer who did not work for approximately 5 months as a result of McGhee's decision to refuse to refer him for further job opportunities. It is, accordingly, axiomatic that a union's refusal or failure to refer its members for employment violates Section 8(b)(1)(A) and (2) of the Act when the refusal or failure to refer the member is engaged in by the union because of that member's having engaged in intraunion activity or for other arbitrary or capricious reasons. See *Local 808 Carpenters (Building Contractors Assn.)*, 238 NLRB 735 (1978); *Laborers Local 282 (Millstone Construction)*, 236 NLRB 621 (1978); *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973); and *Stage Employees IATSE Local 7 (Universal City Studios)*, cited above.

I find that the General Counsel has made a prima facie case that the Union violated Section 8(b)(1)(A) and (2) of the Act by its refusal(s) and failure(s) to refer employee(s) Schlemmer, Michael, and Belt for employment because of their having engaged in intraunion concerted activities and for other arbitrary and capricious reasons. As discussed herein, I do not credit the Union's defense asserted at the hearing with respect to Schlemmer that the Union refused to refer him because of his inadequate job performance in accordance with the need to refer qualified employees to the contractor employers. I also do not credit the Union's defense that employees Michael and Belt were employed for substantially comparable periods as were other union members. The record of referrals shows otherwise as discussed previously. I find that the Union has failed to demonstrate that it would have refused or failed to refer employees Schlemmer, Michael, and Belt for employment in the absence of their having engaged in intraunion activities. Accordingly, I find that in each case the Union has failed to rebut the General Counsel's prima facie case by a preponderance of the evidence and find that the Union violated Section 8(b)(1)(A) and (2) of the Act by its failure and refusal to refer employees Schlemmer, Michael, and Belt for employment. See *Wright Line*, 251 NLRB 1083 (1980). See also *Teamsters Local 515 (Cavalier Corp.)*, 259 NLRB 678 (1981).

C. *The Alleged Violations of the Act by the Union's Acceptance of Recognition by Pipeco of Pipeco's Employees and by the Execution and Maintenance of Collective-Bargaining Agreement(s) with Pipeco, Including Union-Security Provision(s) Therein*

The facts are essentially undisputed with respect to this aspect of the complaint. Pipeco is an Illinois corporation engaged in the fabrication of plastic, steel, and stainless steel pipe to its individual customers' specifications. The fabricated products are then shipped to jobsites. Pipeco does not perform construction work or otherwise serve as a contractor at the jobsites.

Ivan (Skipp) Cochran, the president of Pipeco, was involved in the formation of the corporation. In the course of his efforts to raise sufficient capital, he contacted Union Business Manager McGhee. McGhee testified he saw the establishment of the fabrication business as an opportunity for employment of approximately 50 of the Union's members and, in order to assist Pipeco in its formation, the Union purchased 1500 shares of a total initial issue of 6000 shares of stock by the corporation. McGhee testified that the Union's proxy, voting rights, and control have been assigned to Pipeco's attorney in order that the Union would not be involved in the operation of Pipeco. Under the terms of the agreement, Pipeco has a first option to purchase the Union's stock after a period of 3 years, after which the stock can be sold by the Union on the open market. The Union has not engaged in the operation of the business of Pipeco.

Pipeco commenced its operations in October 1980. On November 1, 1980, when it employed nine production employees,[5] Pipeco executed a collective-bargaining agreement (entitled "Fabrication Agreements") with the Union concerning the employees' wages, hours, and terms and conditions of employment. The Fabrication

[5] I do not find as contended by the General Counsel in his brief that Pipeco's employee complement had risen to 32 at the time of the hearing. The parties stipulated at the hearing that G.C. Exh. 6 (on which the General Counsel relies for this assertion) consisted of the payroll records of all employees who had been hired by Pipeco (excluding managerial and engineering employees) and included some employees who were no longer employed. The total number of employees listed in G.C. Exh. 6 is 34. However, the records show only 17 employees as of the payroll period ending June 9, 1981 (the date of the hearing). Even if the employees listed as of the payroll periods ending April 27, 1981, and May 26, 1981, were to be counted, this would bring the total to only 25 employees.

Agreement provided that it was an addendum to the "National Fabrication Agreement" identified by Cochran at the hearing as the "National Minimum Standard Agreement for a Commercial Pipe Fabrication Shop—Pipe Fabrication Institute Shop Agreement." Although Cochran testified at the hearing that Pipeco was not immediately a party to the National Fabrication Agreement pending the processing of the necessary paperwork, Pipeco has employed only members of the Union as its production employees, and has deducted union dues from employees' wages from the commencement of their employment. The National Fabrication Agreement provides by its terms that Pipeco recognizes the Union as the exclusive bargaining representative of Pipeco's journeymen and apprentices and metal trades employees (art. IV, "Recognition") and also provides for a 30-day union-security clause (art. VII, "Union Security"). Pipeco and the Union also executed a "National Minimum Standard Agreement for a Commercial Pipe Fabrication Shop" on April 14, 1981. Under the terms of this agreement, Pipeco also recognized the Union as the exclusive bargaining representative of its building trades journeymen and apprentices and metal trades employees, and also agreed to a 30-day union-security clause. As of the date of the hearing, Pipeco employed approximately 25 production employees.

Analysis of the Union's Relationship with Pipeco

Although it appears from the undisputed evidence in this case that the Union's sole motivation in its purchase of shares in Pipeco was to improve employment opportunities for its membership and that the Union took steps to remove itself from the day-to-day control over the business of Pipeco, certain violations of the Act must be recognized.

I do not find, as contended by the General Counsel, that the Employer, Pipeco, did not employ a representative complement of employees on November 1, 1980, at the time it executed its initial collective-bargaining agreement with the Union. I find that the General Counsel has failed to show that less than 30 percent of the employment complement at the time of the hearing was in existence at the time of the execution of the collective-bargaining agreement, as I have found there were 9 employees as of the date of the execution of the November 1, 1980 agreement and no more than 25 employees as of the date of the hearing. Accordingly, I do not find a violation of the Act on the basis of the standards set out in *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958), concerning a requirement that 30 percent of the employee complement at the time of the hearing must be found to have been in existence at the time of the execution of the agreement.[6]

I find, however, that the Union has breached its duty of fair representation and has violated Section 8(b)(1)(A) of the Act by its acceptance of recognition from Pipeco and by its execution of a collective-bargaining agreement with Pipeco at such time as it retained a substantial stock interest in Pipeco. By virtue of its ownership of 25 percent of Pipeco's outstanding shares of stock, the Union retains a substantial ownership interest in Pipeco, which financial interest is closely tied to management as contended by the General Counsel. Although it is undisputed that Pipeco and the Union executed a collective-bargaining agreement providing for prevailing wage rates and fringe benefits, the Union's dual position precludes it from fairly representing its members who are employed by Pipeco. See *Miranda Fuel*, 140 NLRB 181 (1962), and *Retail Store Employees Local 428*, 163 NLRB 431 (1967). A violation of Section 8(b)(1)(A) was alleged in the complaint and litigated at the hearing. I find that, given the Union's primary role as a bargianing agent and its secondary role as an employer under the circumstances of this case, a violation of Section 8(b)(1)(A) is appropriate.

I also find that the Union violated Section 8(b)(2) of the Act by its execution of a union-security agreement with Pipeco at such time(s) as it was unable to fairly represent the employees of Pipeco by reason of its substantial stock ownership of Pipeco. Accordingly, I also find that, by entering into the agreement(s) with Pipeco requiring the payment of dues and other payments to the Union for pension and benefit funds pursuant to said collective-bargaining agreement(s), the Union has violated Section 8(b)(2) of the Act. See *Supreme Equipment Corp.*, 235 NLRB 244 (1978).

I also find that the Union violated Section 8(b)(2) by the execution of the collective-bargaining agreement(s) with Pipeco which contain(s) referral clauses therein as these agreements are unlawful prehire agreements. Pipeco is not an employer engaged in the construction industry, and the collective-bargaining agreement(s) executed by Pipeco and the Union are not exempt under Section 8(f) of the Act with respect to employees engaged in the construction industry. See *W. L. Rives Co.*, 136 NLRB 1050 (1962), and *Custom Sheet Metal Co., Inc.*, 243 NLRB 1102, 1108 (1979).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices, as found in section II above, in connection with the status and operations of Respondent Local Union No. 553, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and lead to disputes obstructing the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent Local Union No. 553, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. Plumbing, Heating, Piping and Air Conditioning Contractors Association of Alton, Wood River and Vicinity is and has been an organization composed of em-

[6] Such standards are applied in unfair labor practice cases as set out in *Klein's Golden Manor*, 214 NLRB 807 fn. 2 (1974).

ployees engaged in the construction industry and existing for the purpose of representing its employer members in the negotiation and administration of collective-bargaining agreements with various labor organizations, including Respondent. At all times material herein the aforesaid Association and Pipeco Fabricating Company, France Plumbing, Heating and Air Conditioning, and Murphy Company were employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By threatening to refuse to refer employee Carl Schlemmer for employment to employer members of the Association on or about January 6, 1981, because of his participation in intraunion activities protected under Section 7 of the Act, and because of other arbitrary and capricious reasons, Respondent has violated Section 8(b)(1)(A) of the Act.

4. By threatening to refuse to refer employee Dan Michael for employment to employer members of the Association because of his participation in intraunion activity, and for other arbitrary and capricious reasons, Respondent has violated Section 8(b)(1)(A) of the Act.

5. By failing and refusing to refer out for employment employee Carl Schlemmer, Dan Michael, and Billy H. Belt because of their engagement in intraunion activity, and for other arbitrary and capricious reasons, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

6. By its acceptance of recognition from Pipeco Fabricating Company of its employees at such time as it retained a substantial stock ownership interest in Pipeco Fabricating Company, and by its execution of a collective-bargaining agreement(s) with Pipeco Fabricating Company, Respondent has violated Section 8(b)(1)(A) of the Act.

7. By its execution of a union-security agreement(s) with Pipeco Fabricating Company and by entering into agreement(s) with Pipeco Fabricating Company requiring the payment of dues and other payments to the Union for pension and welfare funds pursuant to these agreement(s), and by entering into an unlawful prehire agreement with Pipeco Fabricating Company, Respondent has violated Section 8(b)(2) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Since I have found that Respondent has discriminated against employees Dan Michael, Carl Schlemmer, and Billy H. Belt by failing and refusing to refer them for employment to employer members of the Association, I shall recommend that Respondent be ordered to make these employees whole for any loss of earnings and benefits they may have suffered as a result of the discrimiantion against them with interest computed thereon in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[7]

Having found that Respondent has accepted recognition from Pipeco Fabricating Company of its employees at such time as it retained a substantial stock ownership interest in Pipeco Fabricating Company, and having found that it executed and maintained a union-security agreement and other agreements in violation of the Act, I shall recommend that Respondent be ordered to cease maintaining and giving effect to its current recognition by Pipeco Fabricating Company as the collective-bargaining representative of its employees and to the 1980 and 1981 collective-bargaining agreements entered into with the Pipeco Fabricating Company or any modification, extension, renewal, supplement, or successive agreement until such time as Respondent shall have been certified by the Board as the exclusive representative of the employees in question.

As the employees of Pipeco Fabricating Company were members of Respondent at the time of their referral to Pipeco Fabricating Company, I find it appropriate to effectuate the purposes of the Act, to order reimbursement of their dues and other payments made by them to Respondent pursuant to the collective-bargaining agreements executed between Pipeco Fabricating Company and Respondent, contingent in each instance upon a request therefore by the particular employee.

[Recommended Order omitted from publication.]

[7] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).